6 cert

ORIGINAL

No. 83-6611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY GIBSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

LYNN E. THOMAS
Solicitor General
State of Idaho
Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400

ATTORNEY FOR RESPONDENT

MICHAEL J. VRABLE
307 Elder Building
Coeur d'Alene, ID 83814
Telephone: (208)667-5415

ATTORNEY FOR PETITIONER

6

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Constitutions

Statutes

Texts

Other

No. 83-6611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY GIBSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

STATEMENT OF THE CASE

Petitioner, Thomas Henry Gibson, was convicted of murder in the first degree for the killing of Kimberly Ann Palmer. Gibson attempted to exclude any evidence concerning the death of a second individual, Scott Currier (based upon Gibson's prior acquittal in Washington of Currier's murder). The trial court held the evidence admissible to portray a "rational and cohesive scenario" and denied the motion. During the trial, Gibson continued to object to the introduction of certain evidence concerning Currier's death. These objections were generally overruled and the evidence admitted. See, State v. Gibson, 675 P.2d 33 (Idaho 1983).

Following his conviction, the trial court sentenced Gibson to death. Idaho law provides that the trial court, without the participation of the jury, shall make sentencing decisions in capital prosecutions. Idaho Code, § 19-2515.

Except for the third issue raised by petitioner, the issues of this case are identical to those of Paradis v. Idaho, No. 83-6653, which is now before this Court on a petition for a writ of certiorari. Both cases arise from the same facts.

SUMMARY OF ARGUMENT

1. The admission, in an Idaho murder prosecution, of evidence tending to show that petitioner had committed a different but related murder in the State of Washington, of which murder petitioner was acquitted in Washington, did not violate the Double Jeopardy Clause of the United States Constitution. The evidence was relevant. The Fifth Amendment does not bar even a second trial for the same conduct by a different, separate sovereign, even though the accused was acquitted in the first prosecution. The well-established dual-sovereignty doctrine precludes the theory that evidentiary use of other-crime evidence related to an offense of which the accused was acquitted violates federal constitutional guarantees. There is no conflict among lower courts relating to federal questions in this area of law.

2. There is no federal constitutional requirement that juries must participate in capital sentencing decisions. The Cruel and Unusual Punishment Clause speaks to different concerns. This Court has repeatedly upheld capital sentencing statutes which authorize judges, rather than juries, to make final decisions respecting the imposition of capital punishment.

3. Enmund v. Florida, 458 U.S. 782 (1982), does not prohibit imposition of the death penalty on one who is found guilty of a crime because he has aided and abetted another in the commission of the crime.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

Petitioner's Conviction Was Not Based on Evidence Admitted in Violation of the United States Constitutional Provision Protecting the Accused from Being Placed Twice in Jeopardy.

Petitioner maintains that his acquittal in the State of Washington of the murder of a different victim, Scott Currier, brought into operation a federal constitutional bar to the use of evidence of the Washington offense in petitioner's Idaho prosecution for the murder of Kimberly Ann Palmer.

The crime described by the evidence, although a separate offense, was not "unrelated." Rather, the facts admitted relating to the Scott Currier murder in Washington were an inherent part of the continuing transaction resulting in the murder of Kimberly Palmer--i.e., a part of the "whole picture." The evidence tended to show that Currier was murdered in the State of Washington, in the presence of Kimberly Ann Palmer, and that Palmer was later killed to protect Paradis and his accomplices from the possibility that Palmer might become a witness against them. See, State v. Paradis, 676 P.2d 31 (Idaho 1983).

As a general rule in Idaho and other jurisdictions, otherwise competent evidence of other unrelated crimes by a defendant is not admissible to show that the defendant is guilty of the crime charged. It is thought that evidence of mere criminal disposition is unduly prejudicial and has the capacity to lead the jury to decide the case on emotion instead of evidence that logically creates an inference of guilt. On the other hand, the rule has been extensively and substantially qualified by the following universally adopted exceptions: evidence of other crimes is admissible when, in addition to other situations not relevant here, such

evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) common design, plan, or scheme, and (5) identification of the accused as the person who committed the crime charged. 1 Wharton, Criminal Evidence, §§ 241, 243-249 (13th ed. 1972). These exceptions have been unequivocally recognized by the Supreme Court of Idaho. State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979); State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971).

Moreover, the rule barring other-crime evidence simply does not apply where the other crime precedes, is contemporaneous with, or is a part of the crime charged, and the circumstances surrounding the other crime are necessary to prove or explain the criminal act charged. 1 Wharton, Criminal Evidence, § 242 (13th ed. 1972) (the "whole picture" rule). The Supreme Court of Idaho recognized this principle in State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975), and gave the following rationale for its decision:

> The state is entitled to present a full and accurate account of the circumstances of the commission of the crime, and if such an account also implicates the defendant or defendants in the commission of other crimes for which they have not been charged, the evidence is nevertheless admissible. The jury is entitled to base its decision upon a full and accurate description of the events concerning the whole criminal act, regardless of whether such a description implicates a defendant in other criminal acts. 96 Idaho at 670, 534 P.2d at 1110.

The quoted language clearly underscores as well as approves the strong public interest in enforcement of the criminal law, including effective prosecution and jury deliberations. See, generally, Standefer v. United States, 477 U.S. 10 (1980), for a discussion of this interest in the context of a decision not to impose nonmutual collateral estoppel against the government in a criminal case.

Thus, the constitutional theory put forward here by the petitioner would have this Court reject the public interest

in effective prosecution and having the whole picture reviewed by the trier of fact because the accused had been acquitted of the other crime prior to the relevant prosecution. Petitioner's contention ignores the substantial, probably majority, body of law supporting the proposition that otherwise competent evidence of another crime is not rendered inadmissible because the accused was acquitted of such crime. See, e.g., 1 Wharton, Criminal Evidence, § 262 (13th ed. 1972, and Supp. 1982 and cases cited therein); Annot., 86 A.L.R. 2d 1132 (1962, Later Case Service 1979, and Supp. 1982); Cleary, McCormick on Evidence, § 190 (2d ed. 1972); note, "Expanding Double Jeopardy: Collateral Estoppel in the Evidentiary Use of Prior Crimes in Which the Defendant Has Been Acquitted," 2 Fla.St.U.L.Rev. 511, 522-524 (1974).

Petitioner's position that the otherwise competent and relevant evidence relating to the murder of Scott Currier in Washington was unconstitutionally admitted in evidence is based on the contentions that: (1) admission violated the Fifth Amendment guarantee against double jeopardy (appellant cites Ashe v. Swenson, 397 U.S. 436 (1970) and Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), in support of this contention); (2) admission was barred by the doctrine of collateral estoppel, which has been applied by this Court to the Fifth Amendment guarantee against double jeopardy (Ashe v. Swenson, supra, and Wingate v. Wainwright, supra); and (3) there are conflicts in the decisions of lower state and federal courts respecting the admissibility of evidence of other offenses of which the defendant has been acquitted.

Appellant's arguments, and his reliance on the previously-cited authority, are misplaced. Not only should the previously-mentioned authority upholding the admissibility of evidence of other crimes despite acquittal be

considered a constitutionally permissible application of rules of evidence, but this case differs fundamentally from appellant's authority.

The first and clearly determinative distinction between petitioner's authority and this case is that in every case cited by petitioner the same state or sovereign first prosecuted the accused (for the crime of which the accused was acquitted) and then reprosecuted the accused for the same conduct or introduced evidence of the prior crime in a subsequent prosecution for a different crime. In this case, petitioner was first prosecuted by the State of Washington for Scott Currier's murder and then prosecuted by the State of Idaho for Kimberly Palmer's murder. As set forth in the Opinion of the Supreme Court of Idaho, State v. Paradis, supra, the evidence of the crimes was so intertwined that part of the circumstantial evidence relating to Currier's murder was also related to, and necessary to explain, Palmer's murder. It was in the later prosecution in Idaho, not Washington, that the issue of admissibility of evidence relating to another crime arose. Consequently, there were different sovereign states involved in the relevant two prosecutions. This distinction renders inapplicable, indeed erroneous, the very reasoning upon which petitioner relies.

Clearly, the Fifth Amendment guarantee against double jeopardy does not bar a second trial for the same conduct by a different, separate sovereign, even though the accused was acquitted or convicted in the first prosecution. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959) (state prosecution followed by federal prosecution); United States v. Wheeler, 435 U.S. 313 (1978) (Indian tribal court prosecution followed by federal prosecution); Pope v. Thone, 671 F.2d 298 (8th Cir. 1982)

(federal prosecution followed by state prosecution); Perry v. United States, 514 F.Supp. 156, D.N.J. 1981 (federal prosecution followed by state prosecution); and State v. Russell, 229 Kansas 124, 622 P.2d 658 (1981) (successive prosecutions by two states). See, also, 1 Wharton, Criminal Law, § 17 at 126 (1972). Bartkus, supra, and Abbate, supra, as well as their progeny, rest on the basic structure of our federal system. The exercise of power of one sovereign should not usurp the right of another sovereign to exercise its power.

Successive prosecutions by separate sovereigns are sanctioned by the dual-sovereignty doctrine in recognition that "a single act may constitute separate and distinct offenses against two sovereigns, punishable by both." United States v. Brown, 604 F.2d 557 (8th Cir. 1979). Consequently, with reference to a paraphrased statement of the Fifth Amendment, the accused is not twice placed in jeopardy for the same offense. Two offenses are involved--one against each sovereign. Wheeler, supra, 435 U.S. at 317-318.

Ashe v. Swenson, supra, reduced to its simplest terms, represents a classic double jeopardy fact pattern where the same sovereign reprosecutes the accused for the same conduct after acquittal--in particular, relitigating the precluded issue of the accused's participation in the relevant robbery. The other case cited by appellant in support of the double jeopardy argument, Wingate v. Wainwright, supra, involved the same sovereign that had first prosecuted the accused for several robberies, subsequently using the evidence of the earlier robberies in a prosecution for a later unrelated robbery. The challenged testimony of the eye witnesses to the other robberies, of which the accused had been acquitted, was offered to show course of conduct.

The Court reasoned that such testimony placed the accused in the position of again being compelled to defend his innocence of the other robberies, and thus he was in effect twice placed in jeopardy for the same offense by the same sovereign. Clearly, these cases cited by petitioner do not reverse or put into question the dual-sovereignty doctrine. As separate sovereigns are involved in the case at hand, Idaho would not have been precluded by the Fifth Amendment from reprosecuting appellant for Scott Currier's murder after the Washington prosecution. Consequently, the Fifth Amendment does not bar the evidentiary use of the facts of Currier's murder, which arguendo, according to Wingate has the same impact as reprosecution for the same conduct. In other words, Ashe incorporated collateral estoppel into double jeopardy as an inherent ingredient, and not as an expansion of the constitutional guarantee. Note, Expanding Double Jeopardy: Collateral Estoppel in the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted, 2 Fla.St.U.L.Rev. 511, 531, n.91 (1974).

The distinction that separate sovereigns were involved in this case is equally determinative of the issue whether collateral estoppel is applicable. Although some dispute exists over the wisdom of, and the prerequisites for, applying the collateral estoppel doctrine in criminal prosecutions, it is commonly accepted that, similar to the same sovereign requirement for the guarantee against double jeopardy, identity of parties, including the prosecuting governmental entity, is required. An acquittal in one criminal case operates as collateral estoppel in another criminal case only where the parties to both proceedings are identical. It is fundamental that the governmental entity against which estoppel is sought must have been a party to the initial prosecution. The State of Idaho is not the same

sovereign as the State of Washington, and thus is not barred by collateral estoppel. United States v. Smith, 446 F.2d 200 (4th Cir. 1971); Annot. 9 A.L.R. 3d 203, 215-218 (1966 and Supp. 1982); Restatement (2d) of Judgments, §§ 27, 28, 34 (1982); 1 Wharton, Criminal Law, § 72 (14th ed. 1978).

Although the stranger to the judgment of acquittal was the defendant rather than the prosecuting attorney in Standefer v. United States, supra, the decision of this Court not to impose collateral estoppel against the prosecuting governmental authority seems relevant to this inquiry. In Standefer, the conviction of an aider and abetter was affirmed despite the prior acquittal of the alleged perpetrator of the offense. Both prosecutions were by the same governmental entity. In refusing to give force to nonmutual collateral estoppel against the government, the Court distinguished a criminal case from the civil case which had approved nonmutual collateral estoppel, noting that in a criminal case the government is frequently without the "full and fair opportunity to litigate," which is the underlying assumption of estoppel. The Court listed as bases for this observation the special limits or prohibitions applicable to a criminal case concerning discovery, admission of evidence, judgment notwithstanding a verdict, new trial, and appellate review. It might also have listed the more difficult burden of proof imposed in criminal cases. In conclusion, the Court stated that "competing policy considerations" outweighed the policies undergirding the estoppel doctrine, quoting the following language from the opinion of the Court of Appeals:

> "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is

> greater than the concern for traditional economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interest of the courts, nor the public. 447 U.S. at 25.

The emphasis and priority given the public interest in criminal cases appears equally pertinent to, and persuasive in, this proceeding.

The conclusion that collateral estoppel should not be applied where there is a lack of identity of the prosecuting authority necessarily involves the conclusion either that it is not unfair to the adverse party to allow the second prosecuting authority to proceed or that the unfairness of precluding the second authority is of greater concern than any unfairness to the adverse party. Preclusion in this case would be particularly unfair given the high probative value of the admitted evidence and the strong, legitimate interest in presenting the "whole picture" to the trier-of-fact. In effect, petitioner in his attempt to deprive the jury of the "whole picture" deviously seeks to avoid absolutely any accountability or prosecution for a murder in Idaho--an offense against the people of Idaho--based upon the prosecution brought by Washington for a different murder. Fairness does not mandate such a ridiculous result.

Even if it were assumed for the purpose of argument that the same sovereign was involved in both prosecutions, respondent contends that the normal standard for admissibility of evidence could constitutionally be applied. The question should be whether the probative value of the evidence outweighs its prejudicial impact. Acquittal should not be an absolute bar to admission. Oliphant v. Koehler,

594 F.2d 547 (6th Cir. 1979); United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972); Ladd v. State, 568 P.2d 960 (Alaska 1977); 1 Wharton, Criminal Evidence, § 262 (13th ed. 1972 and Supp. 1982 and cases cited therein); Annot. 86 A.L.R. 2d 1132 (1962, Later Case Service 1979 and Supp. 1982); Cleary, McCormick on Evidence, § 190 (2d ed. 1972).

The petitioner was appropriately afforded protection against any potential prejudice in this case by the court's jury instruction that evidence of other crimes was to be considered:

> [O]nly for the limited purpose of determining if it tends to show a motive for the commission of the crime charged and the existence of the intent which is a necessary element of the crime charged, and the identity of the person charged with the crime which is on trial. (Trial Tr. Vol. 5, p.677.)

The cases cited by petitioner do not address the dual-sovereignty aspect of this case, and respondent perceives no basis for the argument that there exists a conflict in the decisions of lower courts which should be resolved by this Court. Petitioner also contends that there is a conflict among the decisions of lower courts because some states hold that other crime evidence impacts the admissibility of such evidence as that in the present case, while others hold that evidence of other crimes of which the accused is committed involves the weight of the evidence rather than its admissibility. The cases cited by the petitioner do not conflict in the interpretation of principles of law arising under the United States Constitution. These conflicts are conflicts related to matters of state law, or, in the federal courts, to issues different from that presented here. They do not present a proper federal question for the consideration of this Court.

II.

Whether a Capital Sentence Shall Be Imposed by a Judge or by a Jury is a Matter of Legislative Discretion and is Not Controlled by Rule of Constitutional Law.

Petitioner contends that there is a conflict among lower courts respecting the constitutionality of a sentencing scheme in capital cases that does not involve jury participation. He argues that the conflict should be resolved by this Court and presents the proposition as a reason for granting his petition for certiorari. However, the case cited by petitioner, State v. Quinn, 623 P.2d (Or. 1981), was decided on state constitutional grounds and did not involve a conflicting interpretation of the United States Constitution.

Petitioner argues that the trial is not terminated until the sentencing hearing has been held, wherefore the right to a "trial" by an impartial jury, guaranteed by the Sixth Amendment to the Constitution of the United States, requires jury participation in capital sentencing. He also asserts that the jury is necessary "to maintain a link between contemporary community values and the penal system," Gregg v. Georgia, 428 U.S. 153, 190 (1976), a theory related to the Cruel and Unusual Punishment Clause.

The argument that somehow "evolving community values" must be reflected in capital sentencing confuses the basic question of whether the death penalty is, itself, cruel and unusual punishment with the totally unrelated question of whether there is some constitutional ground for the proposition that the death penalty can be imposed by none other than a jury. It is a novel argument that jury sentencing is constitutionally required in capital cases by the operation of the Cruel and Unusual Punishment Clause. The "evolving standards of decency" referent of those cases which stand for the principle that the Cruel and Unusual Punishment

Clause of the Eighth Amendment is to be applied by considering the extent to which public opinion has come to regard a particular kind or quality of punishment as abhorrent has nothing to do with who shall decide punishment. This Court has stated:

> [T]hat the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, '[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, supra, at 101 ... . Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. ... Gregg v. Georgia, 428 U.S. at 173.

It is apparent that the Court, in considering whether a particular penalty does not comport with the "evolving standards of decency that mark the progress of a maturing society," has been in each case concerned with the quality of the penalty provided and not with the identity of the sentencing authority. See, for example, Gregg v. Georgia, supra (capital punishment); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization); Robinson v. California, 370 U.S. 660 (1962) (imprisonment for status of being addicted to narcotics); Weems v. United States, 217 U.S. 349 (1910) (imprisonment in chains at hard and painful labor); Francis v. Resweber, 329 U.S. 459 (1947) (second attempt at electrocution).

The limitations on Cruel and Unusual Punishment Clause analysis reflected in the foregoing cases is a predictable result of the language of the clause, which is addressed to the appropriateness of particular penalties:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Constitution Amendment VIII. (Emphasis added.)

Consistently, the Cruel and Unusual Punishment Clause has been relevant to the assessment of barbarous methods of punishment and, as the clause has taken on new meaning with

the advancement of social conscience, to methods and varieties of punishment that are offensive in light of contemporary values. Gregg, supra.

If petitioner were correct, one would expect the Cruel and Unusual Punishment Clause to read:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, nor capital sentences inflicted without meaningful community participation.

The clause does not read that way, and to achieve the result petitioner seeks would require writing into it a new principle. Nothing in the history of the clause as it has been interpreted in this Court suggests that it has any relevance to this issue.

Nevertheless, the petitioner urges that the meaning of the clause must now be expanded to regulate a state legislature's choice of sentencing authority. In doing so, he ignores the following admonition of this Court that mirrors a basic principle of division of powers:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, supra, at 383 (Burger, C.J., dissenting). Gregg v. Georgia, 428 U.S. at 175. (Emphasis added.)

In the final analysis, whether the death penalty is imposed by a judge or a jury has nothing to do with whether the penalty is cruel and unusual. Moreover, there is no empirical evidence that judicial sentencing is more likely to result in arbitrary or capricious sentencing decisions

than jury sentencing. Indeed, it has been suggested that the opposite is true:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function [citations omitted], but it has never suggested that jury sentencing is constitutionally required, and it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analagous cases. Proffit v. Florida, 428 U.S. 242, 252 (1976), reh. den. 429 U.S. 875. (Emphasis added.)

Although this Court has not directly considered the question of whether jury sentencing is a constitutional requirement, the Court's opinions contain unmistakable indications that no such mandate is a part of the Constitution. The above-quoted language from Proffit v. Florida, supra, is such an indication. In Dobbert v. Florida, 423 U.S. 282 (1977), reh. den. 434 U.S. 882, the Court reviewed a case in which the trial judge overruled the jury recommendation for a life sentence and sentenced the defendant to death, and upheld the Florida death penalty statute. Although the Court was concerned with whether the statute violated the ex post facto clause, it is significant that the Court found, in the process of determining that the statute was ameliorative and thus not violative of the ex post facto clause, that defendants sentenced under the new statute were not significantly disadvantaged because pursuant to it, "unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court." 432 U.S. 282 at 296. It seems unlikely to respondent that this Court, having once found a judicial sentencing statute constitutional because it was less onerous than a jury

sentencing statute, would now be prepared to hold that evolving standards of decency demand jury sentencing.

Petitioner suggests that Dobbert v. Florida, supra, differs substantially from the questions raised by the Idaho statute inasmuch as the jury had, at least, a chance to express an opinion about the penalty under the Florida sentencing scheme (meaningful community participation). While that may be true, the circumstance was that the trial judge utterly overruled the jury determination and substituted his own, as authorized by the Florida statute, and was upheld in doing so by this Court. The process was one which cancelled out the jury's participation and, for constitutional purposes, respondent is unable to fathom any distinction between no jury participation and jury participation which can be made to count for nothing. Although it is true that the Florida scheme authorizes the jury to express an opinion, which might be expected to have some effect on the judge, there is no existing authority for the proposition that the difference is a matter of constitutional importance.

The constitutionality of Florida's sentencing procedure has received extensive attention from the Florida Supreme Court as well as from this Court. See: Washington v. State, 362 So.2d 658 (Fla. 1977), cert. den. 441 U.S 937 (1979); Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. den. 428 U.S. 911 (1976), reh. den. 429 U.S. 873 (1976); Gardner v. State, 313 So.2d 675 (Fla. 1975), reversed on other grounds, 430 U.S. 379 (1977); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. Florida, supra; Barclay v. State, 343 So. 2d 1266 (Fla. 1977), reversed on other grounds 362 So. 2d 657, cert. den. 439 U.S 892 (1978); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den. 439 U.S 920.

One significant sign of this Court's disinclination to consider jury sentencing a constitutional mandate appears in Justice Rehnquist's opinion as a circuit justice in Richmond v. Arizona, 434 U.S. 1323 (1977), reh. den. 434 U.S. 976 (1977), in which he ruled that a criminal defendant had no constitutional right to have a jury find facts in aggravation or mitigation of punishment and remarked that "Such jury input would not appear to be required under this Court's decision in Proffit." 434 U.S. at 1325. Where the Court has overturned judicially imposed sentences, the decisions rested not on who the sentencing authority was, but on how the sentencing authority's discretion was exercised. Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Appellant suggests that judges cannot adequately reflect community values in the capital sentencing process. Apart from the fact that this analysis, which proceeds from the Cruel and Unusual Punishment Clause cases, has no applicability to the question of who the sentencing authority shall be, its assumption is incorrect.

The contemporary values of the community are reflected in the capital sentencing statutes enacted by the elected representatives of the community, and to a greater extent than jury sentencing would make possible. In the capital sentencing process the judge is restricted almost entirely by those values. He may not impose the death penalty unless he does so upon an aggravating factor specifically identified by the state legislature. Gregg v. Georgia, supra, and the related line of cases speak entirely to the question of whether the selection of the death penalty, by a legislature, is consistent with contemporary standards of decency. None of those cases contains even the slightest suggestion

that the Cruel and Unusual Punishment Clause was meant to test judicial sentencing.

Moreover, the right of the defendant to present all relevant mitigating evidence insures that the death sentencing decision will be based on a full exposition of evidence about the character of the offender, and that, in itself, is considered to be a factor leading to death sentencing decisions on an individualized basis as required by contemporary values as they apply to the capital sentencing process.

It can hardly be gainsaid that the Constitution not only does not require that a jury of twelve persons, which has never been considered in the law to be a representative policy-making body, be allowed to make unguided decisions that the death penalty does or does not comport with "responsible public views," it does not permit such practice. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, supra.

On the other hand, if the sentencing process is guided by statutory factors, as it is, it would appear that a judge rather than a jury is in a better position to insure that death sentences are uniformly imposed, free from factors of whimsy and arbitrariness. It seems to have been the impression of this Court that jurors' lack of experience in sentencing matters was one of the factors responsible for the capricious results that arose out of unguided discretion in sentences imposed by juries:

> Since the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. ... To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance. ... Gregg v. Georgia, 428 U.S. at 192.

If that be the case, judicial sentencing more nearly addresses the Court's concern about arbitrary and capricious sentences than does jury sentencing.

Appellant lastly argues that Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, 448 U.S. 38 (1980), are authorities for the proposition that the jury should be involved in capital sentencing decisions. Witherspoon was concerned with controls on those functions that juries are expected to perform. The case can hardly be thought of as authority for the different proposition that juries are constitutionally expected to make capital sentencing decisions.

III.

A Capital Sentence May Constitutionally Be Imposed upon One Who is Guilty of a Capital Offense by Virtue of His Status as an Aider and Abettor; This Issue Was Not Raised in the State Courts.

Petitioner argues that the evidence supporting the sentencing court's finding of a statutory aggravating factor was not constitutionally sufficient. Petitioner attempts to transform what appears to be a simple factual question into a constitutional issue by making the argument that this Court's decision in Enmund v. Florida, 458 U.S. 782 (1982), precludes imposition of the death penalty in the factual circumstances presented by petitioner's case.

The first response to this argument must be that the petitioner did not present the question to the Idaho Supreme Court, nor did that court consider it. State v. Gibson, 675 P.2d 33 (Idaho 1983). Accordingly, the question is not properly before this Court for consideration. Street v. New York, 394 U.S. 576 (1969); Bailey v. Anderson, 326 U.S. 203 (1945); Michigan v. Tyler, 436 U.S. 499.

Moreover, Enmund v. Florida does not stand for the proposition that one who aids and abets in the commission of a capital offense may not be subjected to capital punishment because of his status as an aider and abettor.

Idaho law defines aiders and abettors as principals in the commission of criminal offenses. Idaho Code § 18-204. State v. Paradis, 676 P.2d 31 (Idaho 1983). Thus, one who aids and abets in the commission of an offense, or advises and encourages its commission, is liable for the offense in the same manner as the person who directly commits the overt act constituting the offense. Idaho Code § 18-204. State v. Paradis, supra. In this case, the evidence was to the effect that the murder of Kimberly Ann Palmer was carried out by Gibson, Donald M. Paradis, who was also convicted of the offense, and a third person. Although each of the actors involved in the commission of the crime was shown to have taken affirmative steps to facilitate its commission, there was no evidence as to which actually strangled Kimberly Ann Palmer to death. Nonetheless, the circumstantial evidence which led to the convictions of Gibson and Paradis showed them to have been equally culpable in the commission of the offense. The district court made specific factual findings with respect to the evidence against the petitioner. The findings reflect the court's careful consideration of all of the evidence and the court's conclusion that Gibson and two other persons participated with equal culpability in the murder of Kimberly Ann Palmer without provocation and for no very compelling reason.

The states have authority to make aiders and abettors equally responsible, as a matter of law, with principals. Lockett v. Ohio, 438 U.S. 586 (1978). See, also, Standefer v. United States, supra.

The trial court made no constitutional error in imposing the death penalty on Gibson, even as an aider and abettor in the commission of the crime of first degree murder.

In Enmund v. Florida, 454 U.S. 939 (1982), the Court held that the death penalty was constitutionally excessive when imposed on one who aided and abetted a felony, in the course of which a murder was committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place. The facts of Enmund are distinguishable. There was no showing of an intent to kill in that case, whereas in petitioner's case the evidence affords a basis for an inference that all of the principals were equally culpable. Petitioner participated in the planning of the murder, he intended that a killing take place, and he aided and abetted in the premeditated murder which actually occurred. See, State v. Gibson, supra. The Court held in Enmund, by implication, that an aider and abettor who intends that a killing take place, even though not directly involved in the actual killing, may be subjected to the penalty of death.

In Lockett v. Ohio, supra, the Court held that where a statute did not permit the sentencing judge to consider as mitigating factors in imposing the death penalty the defendant's lack of specific intent to cause death, and the defendant's role as an accomplice, the statute violated the Eighth Amendment. In Lockett the defendant aided and abetted in the offense by driving a "get-away car" to transport the principals away from the scene of a felony during the commission of which a homicide took place. The Court concluded that the absence of direct proof that the defendant intended to cause the death of the victim and the defendant's comparatively minor role in the offense could

constitute mitigating factors which would militate against imposition of the death penalty. Again, by implication, the case can be read for the proposition that under certain circumstances, namely, where the defendant intended that a killing take place, an aider and abettor may receive the death penalty. See, also, State v. Paradis, supra; Mack v. United States, 326 F.2d 481 (8th Cir. 1964) (an aider and abettor stands in the shoes of the principal for punishment purposes).

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Idaho should be denied.

DATED this 23d day of May, 1984.

Respectfully submitted,

LYNN E. THOMAS
Solicitor General
State of Idaho
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 334-2400

Attorney for Respondent

No. 83-6611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY GIBSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

CERTIFICATE OF MAILING

I, LYNN E. THOMAS, counsel of record for respondent, The State of Idaho, do state under oath, pursuant to Rule 28.2, that the original of the accompanying respondent's RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO was placed in the United States mail on May 23, 1984, first class postage affixed, at Boise, Idaho, addressed to:

Alexander Stevas
Clerk of the Court
U. S. Supreme Court
Washington, DC 20543

LYNN E. THOMAS

SUBSCRIBED AND SWORN TO before me this 23d day of May, 1984.

Notary Public for Idaho
Residing at Boise

CERTIFICATE OF MAILING

No. 83-6611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY GIBSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23 day of May, 1984, served a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO, by placing same in the United States mail, first class postage prepaid, addressed to Michael J. Vrable, Esq., 307 Elder Building, Coeur d'Alene, Idaho 83814, counsel of record for petitioner.

LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF SERVICE

END OF DOCKET